

30.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

WANDA BRANHAM,

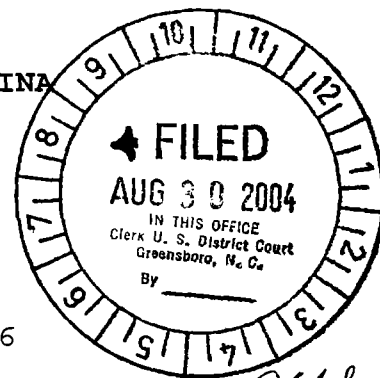
Plaintiff,

v.

WAL-MART ASSOCIATES, INC.,

Defendant.

1:03CV00576



RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Facts

Plaintiff brought this action in state court under North Carolina law by alleging that she was illegally terminated because she pursued a workers' compensation claim. Defendant removed the case to this Court based on diversity jurisdiction and plaintiff then amended her complaint to add a second state law claim for discharge in violation of public policy. Defendant has now moved for summary judgment as to both claims. The relevant facts, as follow, are stated in the light most favorable to the plaintiff, but are largely undisputed.

In 1999, plaintiff began working for defendant at its store in High Point, North Carolina. She worked in the shoe department of the store for several months before leaving to return to her prior job. However, in May of 2001, she came back to work for defendant in the shoe department of the High Point store. She worked full time at that point, stocking products and assisting customers.

On July 23, 2002, plaintiff suffered a work-related injury to her back. She initially returned to work with some restrictions,

but, a few days later, she was struck in the back with a door by a co-worker. This worsened her condition and caused her doctor to restrict her from various actions, such as repetitive bending and stooping, pushing or pulling over 20 pounds, lifting items weighing over 10 pounds, and engaging in any prolonged sitting or standing. Due to this combination of restrictions, defendant had no work that she was able to perform. This resulted in her being out of work and receiving workers' compensation benefits from late July until late November of 2002.

In late November, plaintiff returned to work with a restriction that she not lift more than 20 pounds and that she work only part time. Although she was soon thereafter cleared for full time work, plaintiff only worked four hours a day. She was able to perform the duties of her job, but did occasionally need assistance from her co-workers. Then, on December 17, 2002, a job site analysis was conducted by Polly Geisler with the authorization of defendant's insurance carrier. She recommended that plaintiff use a kneeling pad, stool, pushcart, platform ladder, and ladder to help perform her job duties. After leaving defendant's store that day, she completed her report and sent it by facsimile to defendant's offices. Randy Vestal, the Store Manager, testified at his deposition that this report would have been given to either him or Carolyn Chappell, the store's Personnel Manager. He stated that he never saw the report until shortly before his deposition in this case.

In any event, when plaintiff arrived at work the next day, a mat and stool were available for use in her work area. She already had access to a pushcart, platform, and ladder. There is no evidence in the record as to who put the additional items in plaintiff's area, but they were available in the store for less than \$20.00 each.

Two days later on December 20, 2002, plaintiff was on break when she decided to get a video game for her son. She went to the electronics department and asked one of the sales associates to remove the game and a memory card from a locked display case. At the same time, the associate also removed an item for a customer. Neither the customer nor plaintiff paid for the items in the electronics department. Instead, plaintiff left the electronics department with the items and went to pick up an additional item for her son. She intended to pay for all of the items later in the jewelry department, where she normally made her purchases.

Before getting the additional merchandise, plaintiff was approached by a customer seeking help. After giving him directions, she was approached by two more customers seeking help in finding items in an adjacent department. Plaintiff states that she noticed Randy Vestal watching her at this time. Before going to help the customers, plaintiff laid the game and memory card on top of a display rack. She then assisted the customers and returned some time later to get the game and card. However, they were gone. Plaintiff returned to the electronics department and asked if anyone had returned the items there, but was told that no

one had done so. She then asked whether the department had another game and, when told that it did not, asked to be informed if one arrived or was found. No evidence exists indicating what happened to the missing items during the time that plaintiff was assisting the customers or what eventually became of them.

When plaintiff returned to the shoe department, Vestal asked her where the games were or if she had a receipt for the items. She told him what had happened to them and, at his request, showed him where she had laid the items before they had disappeared. Vestal told plaintiff that this was understocking¹ and that she was accountable for the missing items. He then said he had to make a telephone call and left for his office. Vestal testified in his deposition that just before this conversation occurred, he had been called by the associates in the electronics department and informed that they were concerned because plaintiff had asked for items from the locked display case and then left without paying for them.

After speaking with plaintiff, Vestal returned to his office and spoke with Lee Shipp, defendant's District Manager for Loss Prevention, and Jeff Powell, defendant's District Manager. He told them that plaintiff had taken merchandise from a secure area of the store without paying for it and could not produce a receipt or the merchandise. Both agreed that she should be terminated for understocking and/or failing to protect defendant's assets.

¹According to defendant's discovery responses, "[u]nderstocking occurs when an individual places merchandise in the understock, storage or holding areas of a store for later purchase instead of immediately taking the item to a register for purchase." (Pl. Ex. 25, No. 3)

Shortly after her first conversation with Vestal about the missing items, plaintiff was paged to his office. When she arrived, Hilda Oldham was there and Vestal had her employment file in his hand. He asked her if she had "the games" and she responded that she did not. Plaintiff was then told that she was being terminated for understocking and failing to protect the company's assets. Although plaintiff protested that she did not know what understocking was, Vestal stuck with his decision and she was terminated at that time.

Based on these facts, and a few others which will be discussed later as the need arises, plaintiff has raised two possible claims for relief. First, she contends that defendant's true motivation in firing her was to increase profits by not having to pay her workers' compensation benefits. She asserts that this is a violation of North Carolina's Retaliatory Employment Discrimination Act (REDA) which prohibits retaliation or discrimination against an employee for filing a workers' compensation claim. N.C. Gen. Stat. § 95-241(a)(1)(a). Plaintiff also contends that these same actions constitute a discharge in violation of public policy under North Carolina law. See Brackett v. SGL Carbon Corp., 158 N.C. App. 252, 259, 580 S.E.2d 757, 761 (2003).

Legal Standards

Summary judgment should be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled

to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court must view the evidence in a light most favorable to the non-moving party. Pachaly v. City of Lynchburg, 897 F.2d 723, 725 (4th Cir. 1990). When opposing a properly supported motion for summary judgment, the party cannot rest on conclusory statements, but must provide specific facts, particularly when that party has the burden of proof on an issue. Id. The mere fact that both parties request summary judgment does not necessarily mean that the material facts are undisputed. World-Wide Rights Ltd. Partnership v. Combe Inc., 955 F.2d 242, 244 (4th Cir. 1992). "The summary judgment inquiry thus scrutinizes the plaintiff's case to determine whether the plaintiff has proffered sufficient proof, in the form of admissible evidence, that could carry the burden of proof of his claim at trial." Mitchell v. Data General Corp., 12 F.3d 1310, 1316 (4th Cir. 1993) (emphasis added). A mere scintilla of evidence will not suffice. Rather, there must be enough evidence for a jury to render a verdict in favor of the party making a claim. A few isolated facts are not sufficient. Sibley v. Lutheran Hosp. of Maryland, Inc., 871 F.2d 479 (4th Cir. 1989).

Because both of plaintiff's claims arise under state law, special rules apply. When state law is unclear, the federal court must rule in such a manner as it appears the highest state court would rule if presented with the issue. Where the state's highest court has not decided the particular issue, the federal court should examine the rulings of the lower state courts. Rulings of the lower courts may be considered as persuasive evidence of state

law, but they are not binding on the federal court should it be convinced the highest court would rule to the contrary. Sanderson v. Rice, 777 F.2d 902, 903 (4th Cir. 1985), cert. denied, 475 U.S. 1027, 106 S.Ct. 1226, 89 L.Ed.2d 336 (1986). Furthermore, the federal court must rule on state law as it exists, as opposed to surmising or suggesting an expansion of state law. Burris Chemical, Inc. v. USX Corp., 10 F.3d 243 (4th Cir. 1993).

Discussion

REDA Claim

To prove her REDA case, plaintiff must show that (1) she pursued a workers' compensation claim, (2) defendant took an adverse employment action against her, (3) the workers' compensation claim was a substantial factor in whatever adverse employment action was taken against her, and (4) the adverse action would not have occurred in the absence of the employer's knowledge of the claim. See Johnson v. Friends of Weymouth, Inc., 120 N.C. App. 255, 461 S.E.2d 801 (1995), rev. denied, 342 N.C. 895, 467 S.E.2d 903 (1996). The North Carolina courts have held that plaintiffs may generally rely on the evidentiary standards employed in federal discrimination cases to establish REDA claims. Wiley v. United Parcel Service, Inc., 102 F. Supp. 2d 643, 650 (M.D.N.C. 1999), aff'd, 11 Fed. Appx. 176 (4th Cir. 2001). This means that plaintiff may either proceed using direct evidence or may rely on inferential proof under the now familiar burden-shifting scheme set out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Id. The plaintiff here has not

provided direct evidence that she was fired due to her workers' compensation claim. Therefore, she does rely on a burden-shifting approach.

Under the burden-shifting model, plaintiff must first establish a prima facie case. See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 510-511, 113 S.Ct 2742, 2748-49, 125 L.Ed.2d 407 (1993) (citing McDonnell-Douglas at 802, 93 S.Ct. at 1824). To do this in the present case, plaintiff must show that (1) defendant was aware that she filed a workers' compensation claim, (2) an adverse employment action was taken against her, and (3) the adverse action and protected activity are causally related. Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985). If plaintiff is able to do this, defendant must show that there was a valid reason for any actions it took regarding her. Hicks, 509 U.S. at 510, 113 S.Ct at 2742. Once such a reason is proffered, plaintiff then has to demonstrate that the apparently valid reason was actually a pretext for retaliation or discrimination based on the workers' compensation claim. Id.

Here, the parties agree that evidence exists to establish the first two elements of her prima facie case. There is no question that plaintiff requested and was receiving workers' compensation benefits and that defendant generally, and Vestal specifically, knew this prior to the time that she was terminated. There is also no question that her termination qualifies as an adverse employment

action. The only issue of dispute between the parties regarding plaintiff's prima facie case is whether she has produced evidence from which a jury could find that there is a causal connection between her workers' compensation claim and her termination.

The primary evidence relied on by plaintiff to establish a causal connection between her workers' compensation claim and her firing is timing. However, the parties disagree over whether plaintiff's firing was close enough in time to her pursuit of her workers' compensation claim for any inference to be drawn regarding the claim being the cause of her termination. Defendant believes that any temporal connection between plaintiff's workers' compensation claim and firing should be judged using the date plaintiff first filed her claim for benefits and the date she was fired. These dates are separated by five months in the present case and the North Carolina Court of Appeals has at least twice decided cases where the filing and firing were closer than this. Both times it stated that there was not a close enough temporal connection between the institution of the claim and the termination to allow an inference that the two events were causally connected. See Salter v. E & J Healthcare, Inc., 155 N.C. App. 685, 691, 575 S.E.2d 46, 50 (2003) (approximately three months between filing and firing and no close temporal connection); Shaffner v. Westinghouse Electric Corp., 101 N.C. App. 213, 216, 398 S.E.2d 657, 659 (1990), rev. denied, 328 N.C. 333, 402 S.E.2d 839 (1991) (approximately two

and one-half months between filing and firing and no close temporal connection).

Plaintiff attempts to avoid these cases in two ways. First, she argues that the timing in the present case should not be judged from the time she initially filed her claim, but instead from the time that Polly Geisler performed the site evaluation, i.e. three days before her termination. She asserts that her filing of her claim, her receipt of benefits, her communications with defendant concerning her condition, and her participation in the site evaluation all constitute protected activities which can be considered in deciding whether a temporal connection exists between her workers' compensation claim and her termination.

While performing the calculation in this manner would certainly aid plaintiff in establishing her prima facie case, she has cited no case law supporting her position that any event other than her initiation of her claim should be considered. More importantly, Salter and Shaffner both involved facts where events related to the plaintiffs' workers' compensation claims extended over a period of time. Still, in both cases, the North Carolina Court of Appeals used the initiation of the workers' compensation claim, not later events, to find that no temporal connection existed.

Also, plaintiff's argument fails because it is not logically sound to use the later dates she suggests. Plaintiff does not

explain why, and it is not reasonable to assume, if defendant did not fire her for the initial filing of the claim or even when she began receiving benefits while out of work, that it would then fire her for returning to work or because of a site evaluation that recommended less than forty dollars in accommodations (which defendant immediately complied with). And, unfortunately for her, the initiation of her workers' compensation claim does not, under North Carolina case law, have a close temporal connection to her termination.

Next, plaintiff seeks to circumvent Salter and Shaffner by citing Tarrant v. Freeway Foods of Greensboro, Inc., ___ N.C. App. ___, 593 S.E.2d 808 (2004), for the proposition that the fact that no close temporal connection exists does not automatically mean that a plaintiff cannot prevail. Instead, factors other than the temporal connection can also be considered and, if other evidence of a causal connection exists, a plaintiff can proceed even in the absence of a temporal connection. While Tarrant certainly makes this point clear, the case does not help plaintiff because she does not provide other evidence showing that her workers' compensation claim was connected to her termination. Rather than point to any such evidence in her brief, plaintiff simply makes general statements concerning summary judgment standards and levels of proof. In the end, she has proffered no evidence beyond the timing of the events and the timing evidence is not sufficient to

establish a prima facie case under North Carolina case law.² For this reason, she cannot establish a prima facie case and defendant's motion should be granted as to her REDA claim.

Even if the Court were to find that plaintiff's initiation of her workers' compensation claim or some other protected action were close enough in time to her firing to establish her prima facie case, plaintiff's REDA claim could still not survive the motion for summary judgment. This is because defendant has offered a valid, nonretaliatory reason for her firing and plaintiff has not produced any evidence showing that this reason was a pretext for illegal retaliation.

Defendant states that Vestal fired plaintiff because she took merchandise from a secured area of the store and then lost possession of it without paying for it. He did so because he concluded that these actions constituted understocking and a failure to protect defendant's assets. He felt, and his supervisors agreed, that termination was the appropriate action in this instance.

²Although plaintiff does not set out evidence beyond timing to support her case in the portion of her brief dealing with defendant's prima facie case argument, she does mention several allegedly helpful items of evidence later in her brief in the portion discussing whether or not defendant's reasons for firing her are a pretext. To the extent that any of this evidence could also be potentially useful in establishing a prima facie case, it fails to do so for essentially the same reasons that it does not show pretext.

Plaintiff maintains that she has "overwhelming" evidence from which a jury could find pretext. First, she points to a statement supposedly made by Vestal to Melvin Rainey, plaintiff's immediate supervisor, that plaintiff's absence from the store would hurt profits. Vestal denies ever making the statement, but plaintiff testified in her deposition that shortly after she was injured Rainey told her "Randy [Vestal] said being out was going to hurt the profits, something about the profits like that. I can't recall." (Pl. Dep. at 86) She makes a similar assertion in her affidavit. (Pl. Aff., ¶ 20)

The Court finds for several reasons that Vestal's alleged statement is not evidence of pretext. First, plaintiff does not recall why Rainey told her this or the context in which Rainey made the statement to her. (Pl. Dep. at 86-87) Thus, the evidence requires speculation to make it relevant. Second, plaintiff's deposition and affidavit also do not reveal the context in which Vestal allegedly made the statement to Rainey. The statement as presented by plaintiff is merely a statement of fact. There is no evidence to show that Vestal uttered the statement as a complaint or that he was upset by any effect plaintiff's claim had on profits. Any conclusion that he was would also be pure speculation. Third, the statement was alleged to have been made near to the time plaintiff was first injured. This means that it was removed in time from her firing in the same manner as the

initiation of her claim. Also, if loss of profits were the true reason for defendant firing plaintiff, it would not have made sense to pay benefits to her for several months and then fire her just as she returned to work with minimal accommodations. For all of these reasons, the Court cannot accept the alleged statement by Vestal as evidence of pretext.

Plaintiff next points to the fact that Vestal did admit in his deposition that workers' compensation claims can hurt profits and bonuses. (Vestal Dep. at 113-114, 123) She also points out that profitability was Vestal's responsibility as store manager and adds that her accommodations could have further cost defendant because other employees had to help her perform her job. Again, if profits were the motive for her firing, the timing is somewhat illogical. However, even beyond this, the mere fact that a claim may hurt profits, without more, cannot be sufficient to establish pretext. Otherwise, pretext would automatically be found in workers' compensation cases. Lastly, plaintiff has produced no evidence indicating that any help given to her by other employees significantly impacted store operations in any way so as to hurt profits.

Plaintiff also questions whether Vestal was the appropriate person to fire her. She hypothesizes that Rainey, as her department supervisor, should perhaps have been the proper person and notes that he was out of the store and not consulted when she

was fired. However, she again offers no actual evidence to support her suppositions. In fact, defendant has produced uncontroverted evidence in the form of a declaration from Vestal stating affirmatively that Rainey did not have authority to hire or fire employees and did not need to be consulted for such decisions. There is no evidence creating a dispute on this point.

Plaintiff additionally tries to establish pretext using Geisler's evaluation. She notes that Vestal claims that he never saw the report, but that he testified that either he or Chappell would have received it when it was faxed to defendant's store by Geisler. She points out that the report was acted on the next day without any comment from anyone. Plaintiff claims that Vestal's testimony, the unexplained compliance with Geisler's report, and the fact that Vestal was holding her employment file when she arrived in his office shortly before her termination all add up to raise an "issue of credibility" regarding Vestal.

Plaintiff is simply incorrect in her conclusions. Vestal has testified that he never saw the report until shortly before his deposition and plaintiff has produced no evidence contradicting this. His testimony that either he or Chappell would have received it, that he did not recall receiving it, and the fact that the report was promptly acted on might allow for an inference that Chappell received and acted on the report. However, these facts in no way show that Vestal received or was aware of it. As for

plaintiff's assertion that he was holding her employment file just before firing her, it would hardly be surprising that a supervisor would pull an employee's file at the time of the employee's termination. The fact that he had the file means nothing one way or the other without further evidence explaining the reason that he had the file. It is irrelevant.

Finally, plaintiff challenges a number of the details surrounding her firing. Many of these are also irrelevant to the issues at hand and none of her attacks on defendant's motive succeeds. For instance, plaintiff points out that Vestal allegedly discussed his intention to terminate her with Jeff Powell and Lee Shipp, but that defendant had not substantiated these conversations with sworn statements from these men. The import of this alleged failure of proof is unclear given that plaintiff produced no evidence showing the conversations did not occur, but, in any event, defendant has now provided some such evidence in the form of a declaration from Powell. This declaration confirms that the conversation with him did occur. Plaintiff states that written accounts of her firing which were created by Vestal and Hilda Oldham a month after she was fired differ from other statements and from Vestal's deposition testimony regarding whether she was paged to his office or escorted to his office before being fired. How she arrived in the office is irrelevant to the reasons underlying her firing.

Plaintiff also notes that a written statement by Anquanetta Garrison (employed in the electronics department) does not mention the fact that she notified Vestal regarding the events occurring in the electronic's department. While this is correct, the statement also does not contradict Vestal's testimony in this regard. In a last effort to salvage her case, plaintiff asserts that Ruth Frady and Anquanetta Garrison were not disciplined or terminated for allowing her to leave the electronics department without paying for the merchandise. Even if true, these employees are situated far differently from plaintiff because they only gave her the merchandise for immediate purchase elsewhere. It was plaintiff, not Frady or Garrison, who took that merchandise and laid it on top of a display in another department and it was this action by plaintiff that led directly to the eventual loss of the merchandise. Plaintiff was responsible for the loss, not them.

Overall, defendant states that it terminated plaintiff because she took possession of merchandise, misplaced it on a display instead of immediately paying for it, and then lost custody of the merchandise. Plaintiff seems to assume that defendant fired her for theft or dishonesty or merely because she removed the merchandise from the electronics department without paying for it. The facts show that defendant fired her because she took otherwise secured merchandise from a secured area where it was protected, and left it in an unprotected area where it was apparently taken by

someone else. Moreover, plaintiff was responsible for its loss. She never paid defendant back for the loss and Vestal testified that she never offered to do so. In fact, Vestal testified that when he asked her about the merchandise, she told him it was gone and seemed unconcerned. This lack of concern is demonstrated by plaintiff's own testimony that, when she discovered that the items were missing, her reaction was to go to the electronics department, see if they were there, and when she found they were not there, she simply requested another one, but found the game was out of stock. She did not pay for the items she lost.

The inescapable conclusion in this case is, as defendant asserts, that plaintiff misplaced merchandise and failed to properly protect its assets. It was within its rights to terminate her employment for these reasons. Plaintiff's arguments attempting to show that she was terminated because of her workers' compensation claim are all unsupported, irrelevant, or otherwise insufficient. Just as plaintiff was unable to establish a prima facie case, she has not produced evidence from which a jury could find that defendant's reasons for her termination are a pretext for illegal retaliation. For this additional reason, plaintiff's REDA claim should be dismissed.

Public Policy Claim

The general rule in North Carolina is that it is an "at will" employment state, meaning that employees can be fired at any time and

for any reason, or even no reason, by an employer. Still v. Lance, 279 N.C. 254, 182 S.E.2d 403 (1971). However, an exception to the "at will" rule exists where the termination in question violates public policy. Coman v. Thomas Manufacturing Co., Inc., 325 N.C. 172, 175, 381 S.E.2d 445, 447 (1989). The North Carolina courts have explicitly stated that it is a violation of public policy to discharge a person for exercising their workers' compensation rights. Brackett supra, at 259-260, 580 S.E.2d at 762. Of course, as discussed above, plaintiff has failed to show evidence of such a discharge and has advanced no other basis to support her public policy claim. Therefore, defendant's motion should be granted on this claim as well.

IT IS THEREFORE RECOMMENDED that defendant's motion for summary judgment (docket no. 23) be granted and that judgment be entered dismissing this action.


United States Magistrate Judge

August 30, 2004